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No. 57935-5-I

IN THE COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

MARK LUDVIGSEN,

Defendant/Appellant,

v.

CITY OF SEATTLE,

Plaintiff/Respondent.

THE CITY'S REPLY BRIEF

Moses F. Garcia
WSBA No. 24322
Attorney for City of Seattle
700 Fifth Avenue, Suite 5350
P.O. Box 94667
Seattle, WA 98124-4667
(206) 684-7732

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A. STATEMENT OF THE CASE

Mark Ludvigsen ("Ludvigsen") was arrested for Driving Under the Influence ("DUI") and obtained a Deferred Prosecution for that offense in 2000.[1] He was again arrested for DUI on February 5, 2002.[2] During the 2002 incident, the defendant provided breath samples of .23/.23 Breath Alcohol Content.[3] The defendant was charged with DUI and the City noted its intention to revoke his 2000 Deferred Prosecution for DUI.[4] The defendant failed to appear at his arraignment and preliminary revocation hearing.[5] Bench warrants issued for both cases. Almost three years later, on January 21, 2005, the defendant was arrested on these warrants.[6]

During the three years Ludvigsen evaded prosecution, the legislature amended RCW 46.61.506, governing the admissibility of breath tests.[7] Effective June 10, 2004, the procedures governing admissibility of breath tests changed. Upon passage of the bill, the state toxicologist immediately noted his intention to redraft the administrative rules to eliminate obsolete and redundant rules.[8] Consistent with the amendments to RCW 46.61.506, the state toxicologist amended the administrative rules effective June 10, 2004 to defensibly conform with

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[1] CP 13, 21.
[2] CP 13, 21.
[3] CP 13, 21.
[4] CP 13, 21.
[5] CP 13, 21.
[6] CP 13, 21.
[7] Laws of 2004, Ch 68 §1 (Attached as A).
[8] WSR 04-12-050 (attached as B).

the legislative rules.[9] Effective October 23, 2004, the state toxicologist adopted comprehensive changes implementing the revised admissibility procedures by repealing WAC 448-13 and adopting WAC 448-16 for breath testing in Washington.[10]

At hearing on May 17, 2005 the trial court rejected the procedures in effect and relied upon the former procedures to govern the admission of Ludvigsen's breath test.[11] The trial court concluded the City could not meet the former requirements for foundation based upon the reasoning in *Seattle v. Clark-Munoz*, 152 Wn.2d 39 (2004) and suppressed the breath test result.[12] The defense moved to dismiss the new DUI case and the revocation in light of the suppression and the court granted the motion pursuant to RALJ 2.2(d)(2).[13]

On RALJ appeal by the City, the Superior court reversed the suppression, concluding that the trial court should have applied the admissibility rules in effect on the date of the hearing unless Ludvigsen had a vested right to the rules in effect.[14] The RALJ court reasoned WAC 448-13 did not create a vested right, and the legislature and state toxicologist were free to amend those rules.[15] Discretionary review was requested, with the agreement of the City, and this review follows.

B. ARGUMENT

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[9] WSR 04-12-051 (attached as C).
[10] WSR 04-16-062 (attached as D); WSR 04-19-144 (attached as E).
[11] CP 10.
[12] CP 10.
[13] CP 11.
[14] CP 43-44.
[15] CP 43-44.

Ludvigsen argues applying amended RCW 46.61.506 and WAC 448-16 ("the 2004 Amendments") to his case violates the prohibition on *ex post facto* laws and violates due process. Issues involving application of a statute to a specific set of facts are reviewed de novo.[16] When a lower court's decision turns upon a legal issue, the court of appeals considers the issue de novo.[17] A reviewing court considers legal conclusions de novo.[18]

We address Ludvigsen's substantive arguments below. The first portion briefly discusses the Seattle ordinance under which Ludvigsen was charged and the state statute it mirrors. Because the City ordinance and the state statute governing admissibility of breath tests are precisely the same, the fact Ludvigsen was charged under the City ordinance is irrelevant to any legal issues raised herein.

Next we analyze the 2004 amendments to establish that evidence rules do not operate retroactively merely by affecting acts that predate the law. Evidentiary rules operate prospectively from their effective date in subsequent evidentiary proceedings when those hearings are the precipitating event. No *ex post facto* or due process violations arise when legislative enactments affect only future admissibility hearings.

Finally, we examine Ludvigsen's argument as if the 2004 Amendments are retroactive. We demonstrate that his constitutional rights are not violated by altering what appears in evidence when the

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[16] *State v. Kistner*, 105 Wn. App. 967, 21 P.3d 719 *rev. den.* 145 Wn.2d 1003 (2001).
[17] *State v. L.W.*, 101 Wn. App. 595, 6 P.3d 596 (2000).
[18] *State v. Holmes*, 108 Wn.App. 511, 31 P.3d 716 (2001).

prosecution's evidentiary burden at trial remains the same. Ludvigsen acquired no vested rights to the former procedures by his mere expectation they would continue and the legislature was free to amend them.

1. The fact Ludvigsen was charged under the City's Ordinance and not the State statute is irrelevant to our legal analysis because the City law and the State law governing admissibility of breath tests rely upon identical standards.

Ludvigsen consistently refers to the Seattle ordinance under which he was charged, implying it alters the legal analysis herein. It does not. RCW 46.61.506(3) governing admissibility of breath tests states:

> Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose. ...

Seattle's SMC 11.56.020(J) mimics the statute and states:

> Analysis of a person's blood or breath to be considered valid under the provisions of this section shall have been performed according to methods approved by the State Toxicologist and by an individual possessing a valid permit issued by the State Toxicologist for this purpose.

Seattle's local ordinance mirrors the State's admissibility provisions for breath tests. As it must to maintain uniform vehicle laws.[19] The fact Ludvigsen was charged with DUI under a local ordinance is irrelevant. Accordingly, our analysis refers only to the state statute in this discussion.

2. The 2004 amendments do not act retroactively merely by affecting conduct that predates enactment of the amendments. Instead, the

[19] *Seattle v. Williams*, 128 Wn.2d 341, 908 P.2d 359 (1995)(City ordinance preempted by state law which requires traffic laws be uniform throughout the state).

2004 amendments act prospectively to affect admissibility proceedings conducted after their effective date.

Ludvigsen argues that applying amended RCW 46.61.506 and WAC 448-16 ("the 2004 Amendments") to his 2002 DUI case is the retroactive application of a law. A statute does not operate retroactively merely because it is applies to conduct predating the statute's enactment.[20] A statute operates prospectively when the precipitating event for its application occurs after the effective date of the statute.[21] To determine the precipitating event giving rise to application of a statute, a court may look to the language of the statute and the subject matter regulated by the statute.[22]

The 2004 amendments to RCW 46.61.506 relate to admissibility of breath tests and the standards judicial officers apply during breath test admissibility hearings.[23] The legislative preamble to the 2004 Amendments states, in relevant part:

> To accomplish [the goal of swift and certain consequences for those who drink and drive] the legislature adopts standards governing the admissibility of tests of a person's blood or breath. These standards will provide a degree of uniformity that is currently lacking, and will reduce the delays caused by challenges to various breath test instrument components and maintenance procedures. Such challenges, while allowed, will no longer go to admissibility of test results. ...[24]

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[20] *State v. T.K.*, 139 Wn.2d 320, 330, 987 P.2d 63 (1999).

[21] *T.K.*, 139 Wn.2d at 229; *State v. Holsworth*, 93 Wn.2d 148, 154, 607 P.2d 845 (1980)(challenge to present use of prior unrepresented plea in criminal sentencing is not "retroactive").

[22] *T.K.*, 139 Wn.2d at 331-32 citing *In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997).

[23] *City of Fircrest v. Jensen*, ___ Wn.2d ___(filed Oct. 5, 2006).

[24] Laws of 2004 Ch. 68 §1.

The language of the 2004 Amendments concerns admissibility standards for use in admissibility proceedings and directs that existing procedures will "no longer" delay trials or foster conflicting results. According to the plain language of the statute, the precipitating event for the 2004 Amendments is the admissibility hearing.

The motion to suppress that Ludvigsen seeks to resurrect herein was particularly a target of the 2004 Amendments. The 2004 Amendments replaced the former admissibility procedures in WAC 448-13 to end statewide inconsistent results in admissibility proceedings and time-consuming pre-trial delays. During the passage of these 2004 legislative amendments, only one significant DUI issue was before the court—the issue discussed in *Clark-Munoz*.[25] As with the prior challenges in *Cannon v. DOL*[26] and *Seattle v. Allison,*[27] the issue in *Clark-Munoz* involved the thermometer component of the breath test program. Thus, while the 2004 legislative amendments generally end "challenges to various breath test components and maintenance procedures", it specifically contemplates the *Clark-Munoz* issue Ludvigsen raised at hearing below. Thermometer documentation was specifically deleted as a prerequisite to admissibility under the 2004 Amendments and Ludvigsen's complaint became a question for the jury to consider.[28] Remedial statutes should be construed in light of the prior common law, the mischief to be remedied, and the

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[25] *Seattle v. Clark-Munoz*, 152 Wn.2d 39, 93 P.3d 141 (2004).
[26] *Cannon v. DOL,* 147 Wn.2d 41, 50 P.3d 627 (2002).
[27] *Seattle v. Allison,* 148 Wn.2d 75, 59 P.3d 85 (2002).
[28] RCW 46.61.506(4)(c).

remedy provided, so as to suppress the mischief and advance the remedy.[29] Courts interpret the coverage provisions of remedial statutes broadly, and the limitations on coverage narrowly.[30]

In considering the scope of the 2004 Amendments, this court should strictly the former laws, enactments in derogation of the common law. The court in *State v. Baker*[31] enunciated the factors governing admission of a breath test under the common law. The foundational requirements of former WAC 448-13 construed in *Clark-Munoz* are in derogation of the common-law requirements in *Baker*.[32] Laws in derogation of the common law are strictly construed.[33] In strictly construing laws in derogation of the common law, the court in *State v. Clevinger,*[34] and again in *State v. Pope,*[35] held that statutes governing the admissibility of marital statements are governed by the law in effect on the date of the hearing and not the date of the incident. Strictly construing the effect of the former laws and WAC 448-13 entails limiting them by applying the 2004 amendments to every pending case.

In addition to the language of the statute, the court may also consider the subject matter addressed by the provisions in question.[36] The

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[29] *Peet v. Mills*, 76 Wash. 437, 136 P. 685 (1913).
[30] *Sabastian v. State Dept. of Labor and Industries*, 142 Wn.2d 280, 12 P.3d 594 (2000) reconsideration denied.
[31] *State v. Baker*, 56 Wn.2d 846, 355 P.2d 806 (1960).
[32] *City of Fircrest v. Jensen*, (filed Oct. 5, 2006)("[I]n 2004, this court deviated from precedent and suppressed numerous BAC tests based on a failure to comply with a WAC that did not concern one of the four *Baker* requirements.").
[33] *Keller v. City of Bellingham*, 92 Wn.2d 726, 600 P.2d 1276 (1979).
[34] *State v. Clevinger,* 69 Wn.2d 136, 417 P.2d 626 (1966).
[35] *State v. Pope*, 73 Wn.2d 919, 923-24, 442 P.2d 994 (1968).
[36] *T.K.*, 139 Wn.2d at 332.

focus of the 2004 Amendments concerns admissibility of evidence.[37] Our courts consistently hold that the rules in effect on the date of hearing govern the admissibility of evidence.[38] The defendant bears the risk of any intervening changes in evidentiary law and will not be heard to complain that his flight from prosecution advantaged the State.[39]

In *Letourneau v. Dept. of Licensing*,[40] the court applied the 2004 revisions to RCW 46.61.506 to determine the admissibility of a breath test conducted before the effective date of the 2004 Amendments.[41] Similarly in *State v. Long*,[42] the court applied the law in effect at trial to admit into evidence the defendant's refusal to submit to breath testing after his DUI arrest. Had the *Long* court applied the law in effect on the date of the arrest and test refusal, the evidence would have been inadmissible under the court's prior holding in *State v. Zwicker*.[43] Importantly, the text of the 2004 Amendments includes reference to *State v. Long*, noting the authority of the legislature to enact these rules.[44] In *Seattle v. Carnell*,[45] the defendant alleged the prosecution failed to establish foundation for admission of the test result. In rejecting the foundational challenge, the court applied the foundational requirements adopted after the February 13,

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[37] See e.g. *City of Fircrest v. Jensen,* (filed Oct. 5, 2006).
[38] See e.g. *State v. Clarke*, 86 Wn. App. 447, 452-53, 936 P.2d 1215 (1997) citing *United States v. Rivera Diaz*, 538 F.2d 461, 464 (1st Cir. 1976).
[39] *Clarke*, 86 Wn. App. at 452.
[40] *Letourneau v. Dept. of Licensing*, 131 Wn. App. 657, 660, 128 P.3d 647 (2006).
[41] *Letourneau*, 131 Wn. App. at 660 (defendant arrested on April 29, 2004).
[42] *State v. Long*, 113 Wn.2d 266, 271 FN 15, 778 P.2d 1027 (1989).
[43] *State v. Zwicker*,105 Wn.2d 228, 713 P.2d 1101 (1986).
[44] Laws of 2004, Ch 68 §1.
[45] *Seattle v. Carnell*, 79 Wn. App. 400, 405, 902 P.2d 186 (1995).

1991 date-of-violation. In *Asphalt v. Dep't Labor & Indus.*,[46] the court admitted the state toxicologist's blood test result when the statute governing its admission was amended shortly before trial and almost three years after the incident. The *Asphalt* court applied the recent amendment because "It does not involve any vested rights, obligations, duties or disabilities, but is merely a rule of evidence."[47]

Consistent with the intention stated in the 2004 Amendments, the admissibility rules should apply to every admissibility hearing conducted after June 10, 2004,. Applying the 2004 Amendments is consistent with the court's longstanding practice of applying the admissibility rules in effect on the date of the hearing to every pending case.

3. The procedures in the 2004 Amendments are remedial and apply to all admissibility hearings arising after the effective date of the statute.

Statutes are presumed to operate prospectively, unless remedial in nature or unless the Legislature provides for retroactive application.[48] A statute that relates to practice, procedure, or remedies and does not affect a substantive or vested right is presumed to operate in every case upon its effective date—the reverse of the standard presumption.[49] This general presumption of retroactivity of procedural statutes applies to criminal statutes.[50] Where an amendment to a criminal statute affects neither the definition of the crime nor the penalty for the crime, the rule of strict

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[46] *Asphalt v. Dep't Labor & Indus.*, 19 Wn. App. 800, 578 P.2d 59 (1978).
[47] *Asphalt*, 19 Wn. App. at 805.
[48] *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997).
[49] *State v. Hodgson*, 44 Wn. App. 592, 602-03, 722 P.2d 1336 (1986).
[50] *Hodgson*, 44 Wn. App. at 602-03.

construction should not override the general rule that a procedural statute is presumed to operate in all cases.[51] Under this exception to the general rule, remedial statutes are applied retroactively if retroactive application would further the remedial purpose of the statute.[52]

Under this analysis the 2004 Amendments are applied retroactively unless the court concludes Ludvigsen has a substantive or vested right to the former procedures. In *State v. Long*[53] the court faced an almost identical circumstance to our own herein. The *Long* court had previously reviewed RCW 46.61.517 in *State v. Zwicker*[54] and concluded that statute failed to establish that evidence of a breath test refusal is admissible at trial. The *Long* court was forced to revisit the issue because the legislature revised RCW 46.61.517 before *Zwicker* was published. Eight days before the revised amendments became effective, Long was arrested and refused his breath test. If the law in effect on the date of Long's refusal governed, the refusal would be suppressed under the prior ruling in *Zwicker*. However, consistent with the general rule, the *Long* court applied the remedial law in effect on the date of the trial, not when the test was refused. The *Long* court states:

> The 1986 amendment to RCW 46.61.517 became effective on June 11, 1986, 8 days after the defendant's arrest. The 1986 version applies here, however, since statutes that relate to practice, procedure or remedies and which do not affect a contractual or vested right or impose a penalty will usually be held to apply to pending causes of action. *Godfrey v. State*, 84

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[51] *Hodgson*, 44 Wn. App. at 602-03.
[52] *In re Park at Dash Point L.P.*, 152 B.R. 300, *affirmed* 985 F.2d 1008 (1991).
[53] *State v. Long*, 113 Wn.2d 266, 778 P.2d 1027 (1986).
[54] *State v. Zwicker*, 105 Wn2d 228, 713 P.2d 1101 (1986).

> Wn.2d 959, 961, 530 P.2d 630 (1975); *Poston v. Clinton*, 66 Wn.2d 911, 915-16, 406 P.2d 623 (1965); *see also Superior Asphalt & Concrete Co. v. Department of Labor & Indus.*, 19 Wn. App. 800, 805, 578 P.2d 59 (1978)(amendment to evidentiary statute may be applied retrospectively).[55]

Similarly, in *Seattle v. Carnell*[56] the defendant alleged the prosecution failed to establish foundation for admission of the BAC result. In rejecting the foundational challenge, the court applied the foundation requirements adopted after the February 13, 1991 date-of-violation, stating:

> [T]he current WAC procedures and protocol (WAC 448-13-010 through –200) were effective as of March 29, 1991, **thus in effect at the time of trial**. Contrary to [defendant's] claims, neither these sections (nor the former sections WAC 448-12) of the Washington Administrative Code, nor CrRLJ 6.13 establishes as a requirement for admissibility testimony as to the chain of custody of the simulator solution.[57]

In *State v. MacKenzie*[58] the court concluded the breath test admissibility procedures in WAC 448-13 are not substantive and create no vested rights. Since former WAC 448-13 is not substantive, Ludvigsen acquired no vested rights under these rules. Accordingly, the legislature was free to amend the breath test admissibility procedures and these procedures presumptively apply to every pending case.

Finally, in *Letourneau v. Dept of Licensing*[59] the court held that the June 10, 2004 amendments are curative and remedial and applied the amendments to a test conducted before the effective date of the

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[55] *Long*, 113 Wn.2d at 271 FN 15.
[56] *Carnell*, 79 Wn. App. at 400.
[57] *Carnell*, 79 Wn. App. at 405 (emphasis added).
[58] *State v. MacKenzie*, 114 Wn. App. 687, 699, 60 P.3d 607 (2002).
[59] *Letourneau*, 131 Wn. App. at 660.

amendments.[60] The *Letourneau* court's reasoning is also supported by the presumption that a legislative enactment amending an act to conform with its original intent, after controversies arise, is considered to be clarifying, remedial, and curative.[61] Herein, the 2004 Amendments address the specific issue later resolved in *Clark-Munoz*. As the *Clark-Munoz* opinion documents, the state toxicologist specifically did *not* intend to adopt the technical definition of certain terms applicable to thermometer testing.[62] Rather, the state toxicologist published his interpretation on the intent of WAC 448-13-035 in Wash. St. Reg. 01-17-009 (Aug. 2, 2001). The 2004 Amendments ended this debate, and they did so before the court issued its opinion in *Clark-Munoz*. [63]

An amendatory act constitutes a repeal to the extent it is inconsistent with the act it amends.[64] Repeal of an act does not extinguish vested rights.[65] However, as noted in both *MacKenzie* and *Letourneau*, WAC 448-13 does not create vested rights. Absent a savings clause indicating pending cases are preserved, a repealing act terminates all rights dependant upon the repealed act and all proceedings based upon it.[66] The legislature did not enact a savings clause to preserve the former rules in

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[60] *Letourneau*, 131 Wn. App. at 663.
[61] *Johnson v. Continental West*, 99 Wn.2d 555, 560-62, 663 P.2d 482 (1983).
[62] *Clark-Munoz*, 152 Wn.2d at 46.
[63] *Bowen v. Statewide City Emp. Retirement System*, 72 Wn.2d 397, 433 P.2d 150 (1967)(ambiguity surrounding statute is an indication of legislative intention to clarify law by later amendment).
[64] *Cazzanigi v. General Elec. Credit*, 132 Wn.2d 433, 441, 938 P.2d 819 (1997) citing *Council of Camp Fire v. Revenue*, 105 Wn.2d 55, 711 P.2d 300 (1985).
[65] *Council of Camp Fire v. Revenue*, 105 Wn.2d at 63.
[66] *Cazzanigi*, 132 Wn.2d at 441.

pending cases.[67] In our circumstance, the legislature not only adopted exclusive factors governing the procedures for breath testing, the state toxicologist conceded this rendered many parts of the existing WAC 448-13 obsolete. Consequently, he repealed the former procedures in WAC 448-13—did not authorize a savings clause to allow the existing regulations to survive repeal in pending cases—and implemented new WAC 448-16.

In particular, rights in derogation of the common-law do not survive repeal of their authorizing statute.[68] At common-law, all relevant evidence is admissible.[69] Because the former breath testing procedures exclude evidence on the basis of procedural compliance, and not relevance[70], they are in derogation of the common-law. Accordingly, any procedural rights that arose under the former administrative code died with the repeal of those administrative procedures.

The procedural nature of the 2004 Amendments create a presumption they are intended to apply to every pending case. Applying them to pending cases furthers the stated intention of the 2004 Amendments. Our court has consistently held that the legislative rules governing admission of the breath test are procedural and create no vested rights. Finally, the 2004 amendments are curative and remedial because

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[67] E.g. *State v. Kane*, 101 Wn. App. 607, 5 P.3d 741 (2000)(RCW 10.01.040 is savings clause and preserves prosecutions for crimes committed under repealed statute).

[68] *Seattle Rendering v. Darling Delaware Co.*, 104 Wn.2d 15, 19, 701 P.2d 502 (1985).

[69] See e.g. *Keisal v. Bredlick*, 192 Wash. 665, 74 P.2d 473 (1937).

[70] In neither *Clark-Munoz*, *Seattle v. Allison*, nor *Cannon v. DOL* did the defense allege the breath test results were scientifically inaccurate or unreliable.

they address the controversy raised in *Clark-Munoz* while that controversy was raging statewide and the amendments were effective before any judicial opinion was issued .

4. Applying the 2004 Amendments does not offend the prohibition on ex post facto laws because the changes do not alter the quantum of evidence necessary to convict the defendant of DUI.

Ludvigsen argues that applying the 2004 Amendments to him violates the *ex post facto* clauses of both the State and Federal constitutions. Despite the opportunity to raise the issue on RALJ review below, Ludvigsen failed to do so. He now raises the issue for the first time herein.[71]

The *ex post facto* prohibition is addressed to laws, "whatever their form which make innocent acts criminal, alter the nature of the offense, or increase the punishment."[72] The United States Supreme Court defines *ex post facto* laws as those falling within four categories: 1) Every law that makes an innocent action done before the passing the law, criminal; 2) Every law that aggravates a crime, or makes it greater than it was when committed; 3) Every law that changes to inflict greater punishment than the law allowed when the crime was committed; 4) Every law that alters the legal rules of evidence and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.[73]

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[71] See e.g. RAP 2.5(a) Errors raised for first time on review.

[72] *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).

[73] *State v. Clevinger*, 69 Wn.2d 136, 141, 417 P.2d 626 (1966), quoting *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798).

Ludvigsen relies upon the last *Calder* category, claiming the 2004 Amendments permit less evidence than the law required at the time of his offense in order to convict him. *In Hopt v. Territory of Utah*,[74] the court considered this fourth category. This lengthy quote is instructive:

> Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofor committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed. The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged.[75]

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[74] *Hopt v. Territory of Utah*, 110 U.S. 574, 588, 4 S.Ct. 202, 28 L.Ed.2d 262 (1884).
[75] *Hopt*, 110 U.S. at 589-90, 4 S.Ct. at 210.

The 2004 Amendments do not alter in the least the evidence necessary to convict Ludvigsen of DUI. Under the former or the current procedure, the State must prove each element of the charge of DUI beyond-a-reasonable-doubt—including the accuracy and reliability of the breath test.[76] Accordingly, the prosecution's trial burden remains completely unchanged and neither less nor different evidence is required for conviction. Ludvigsen's argument is merely that some evidence of his intoxication might be excluded if the former procedures remained in effect. Like the circumstance in *Hopt*, while the evidence admitted at trial may be altered, that is not the test for an *ex post facto* violation. Under *Hopt*, merely changing procedures relating to the admissibility of evidence at trial is not sufficient to violate the *ex post facto* clause.

The court in *Collins*[77] affirmed the limitations of the original *Calder* categories and affirmed *ex post facto* challenges apply only to penal statutes.[78] The *Collins* court states:

> As cases subsequent to *Calder* make clear, this [alters the legal rules of evidence] language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes."[79]

The *Collins* court held that the fourth *Calder* category prevents laws that "deprive one charged with a crime of any defense available according to

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[76] RCW 46.61.502; *State v. Franco*, 96 Wn.2d 816, 828, 639 P.2d 1320 (1982).
[77] *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).
[78] *Collins*, 497 U.S. at 43 FN3.
[79] *Collins*, 497 U.S. at 43 FN 3 citing *Thompson v. Missouri*, 171 U.S. 380, 386-87, 18 S.Ct. 922, 924-25, 43 L.Ed. 204 (1898).

law at the time when the act was committed."[80] The court explains a protected "defense" is one based upon an affirmative defense of justification or excuse because eliminating such a defense expands the scope of a crime after it was committed.[81] The *Collins* court expressly overruled *Kring v. Missouri*[82] because the *ex post facto* clause is not violated by procedural changes that arise before trial and do not provide a legal defense to the charged crime. Likewise, the court in *Carmell v. Texas*,[83] iterates the prohibition on reducing the quantum of evidence necessary to meet the prosecution's trial burden.

Herein, the 2004 Amendments are neutral procedural rules enacted by the legislature. They are not penal laws in that they do not alter the elements or the penalty for any crime.[84] The 2004 Amendments also affect no affirmative defenses, justifications, or legal excuse to the crime of DUI. Unlike the circumstance in *Carmell*,[85] the prosecution's evidentiary burden herein remains the same before and after the changes. And unlike *Carmell*, a breath test result is itself insufficient to convict Ludvigsen for DUI.[86] In addition to pre-trial admissibility, the prosecution must prove the breath test result is accurate and reliable beyond a reasonable doubt.[87] The 2004 Amendments are procedural refinements, consistent with the

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[80] *Collins*, 497 U.S. at 52.
[81] *Collins*, 497 U.S. at 49.
[82] *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1883).
[83] *Carmell v. Texas*, 529 U.S. 513, 532-33 FN23, 120 S.Ct. 1620, 1643 (2000).
[84] *Alderman v. Timpani*, 56 Wn.2d 20, 21, 351 P.2d 163 (1960).
[85] *Carmell*, 529 U.S. at 552, 120 S.Ct. at 1643 (revision to statute allowing conviction upon uncorroborated testimony of minor violates *Calder* by authorizing conviction upon less evidence).
[86] *State v. Straka,* 116 Wn.2d 859, 875, 810 P.2d 888 (1991)("Breath test evidence alone is not conclusive evidence of the per se offense").
[87] *State v. Franco*, 96 Wn.2d 816, 828, 639 P.2d 1320 (1982).

original intent of the state toxicologist which did not alter in the least the State's burden at trial. While the *Collins* court noted the historical ambiguity of relying upon a "procedural" or "substantive" distinctions, the *Collins* court explains that, "while these cases do not explicitly define what they mean by the word 'procedural,' it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes."[88]

Consistent with the recent opinion of *City of Fircrest v. Jensen*,[89] our court characterizes the revisions to RCW 46.61.506 as procedures relating to the admissibility of breath tests. Ludvigsen's argument that applying the 2004 Amendments violates the *ex post facto* clauses of either the Washington or Federal Constitutions is without merit.

5. The 2004 Amendments do not violate the defendant's due process rights by any "fundamental unfairness".

Ludvigsen argues that applying the 2004 Amendments to him also violates his constitutional due process rights. He acknowledges his due process concerns in the application of retroactive legislation are the same as those encountered in his *ex post facto* analysis.[90] Accordingly, Ludvigsen's due process analysis largely restates his *ex post facto* argument. For example, he cites *Talavera v. Wainwright*, 468 F.2d 1013, 1015-16 (5th Cir. 1972) in support of his theme that the constitution prohibits retroactively applying an amended law "in such a way that a

[88] *Collins*, 497 U.S. at 45.
[89] *City of Fircrest v. Jensen*, (filed Oct. 5, 2006).
[90] Ludvigsen Opening Brief at 35.

person accused of a criminal offense suffers any significant prejudice in the presentation of his defense." However, *Talavera v. Wainwright* relies upon *Kring v. Missouri* as authority for its position—the case reversed by our supreme court in *Collins* on this issue. *Kring* provides no support for Ludvigsen. Ludvigsen also recites a portion of the *ex post facto* analysis from *Carmell*, however he omits any reasoning relating his quotation to any due process analysis.[91] Extracting partial quotes from *Carmell* and labeling breath test evidence as "insufficient as a matter of law" under the former procedures is not illuminating. Every *ex post facto* challenge concerns the application of a new law to a pre-existing circumstance and the defense claim is always that the new law should not apply to allow formerly inadmissible evidence.[92] Neither labels nor citation to *ex post facto* analysis advances Ludvigsen's due process argument.

Similarly misplaced is his reliance upon Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 55 S.Ct. 758 (1935) wherein the court concludes the legislature altered contract rights and appropriated private property by its sweeping railroad pension laws. Neither property nor contracts are at issue in our own case and Ludvigsen cannot analogize his circumstance to text-book examples of vested rights involving real or personal property affected by revised laws.

Statutes are presumed constitutional and the party challenging them has the burden of proving unconstitutionality beyond-a-reasonable-

[91] Ludvigsen Opening Brief at 35-36, citing *Carmell* at 532-3.

[92] See e.g. *Thompson v. Missouri*, 171 U.S. 380, 18 S. Ct. 922, 43 L.Ed. 262 (1884)(affirming new law permitting handwriting testimony supercedes former rule that such evidence is incompetent).

doubt.[93] In order to invoke the limitations of due process, it must be shown that the government activity involved violates a specific constitutional right of the defendant.[94] For example, in *South Dakota v. Neville*[95] the defendant alleged a violation of his right to silence when the government used his refusal to perform the breath test as evidence at trial. The *Neville* court rejected the due process argument, concluding the defendant was not unfairly tricked by allowing into evidence a refusal without a prior warning that the refusal would be admitted at the criminal trial. In our own case, Ludvigsen argues the unfairness of his circumstance is that he could have had the breath test suppressed anytime prior to the 2004 Amendment's effective date of June 10, 2004—but not after that date. In other words—despite a twenty-eight month opportunity to make his motion to suppress, a legal obligation compelling his appearance in court on these cases, public notice of the passage of the 2004 Amendments on March 22, 2004, and a 90-day delay before it took effect on June 10, 2004—Ludvigsen thinks he still should now have an opportunity to suppress the evidence. We disagree.

As *Clark-Munoz* documents, the state toxicologist did not intend to create the documentary requirements that court later implied.[96] Ludvigsen's test was performed in exactly the manner the state

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[93] *State v. Hernandez-Mercado*, 124 Wn.2d 368, 380, 879 P.2d 283 (1994).

[94] *State v. Myers*, 102 Wn.2d 548, 551, 689 P.2d 38 (1984); But see *State v. Lively*, 130 Wn.2d 1, 20, 921 P.2d 1035 (1996) (due process violation based upon police misconduct need not allege conduct violates constitutional right of defendant).

[95] *South Dakota v. Neville*, 459 U.S. 553, 565, 103 S.Ct. 916 (1983).

[96] *Clark-Munoz*, 152 Wn.2d at 46.

toxicologist intended, with exactly the protections the state toxicologist intended and with no evidence the test is inaccurate. Later—after the state toxicologist published his interpretation of WAC 448-13-035 in Wash. St. Reg. 01-17-009 (Aug. 2, 2001), after Ludvigsen's breath test, and after the legislature took steps to clarify its intention regarding these purely procedural challenges—the *Clark-Munoz* court issued its opinion upon then defunct WAC 448-13-035. These facts do not present outrageous conduct that shocks the universal sense of fundamental fairness.[97]

In *State v. Straka,*[98] the defense alleged a due process violation based upon the state toxicologist's failure to approve and design breath test methods before their implementation, as required by RCW 46.61.506(3). The *Straka* court rejected the challenge, noting the statute requires the state toxicologist merely "approve" the methods, whether before or after the test. A defendant need not have any awareness of the "approved methods" for a breath test because they need not be approved on the date of the test. No due process "fundamental unfairness" arises by allowing remedial legislation to close an unintentional loophole.[99]

6. The 2004 Amendments do not affect any vested rights and do not affect the defendant's rights under the implied consent statute because they clarified only procedural issues and effected no substantive changes.

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[97] *State v. Lively*, 130 Wn.2d 1,19, 921 P.2d 1035 (1996).

[98] *State v. Straka*, 116 Wn.2d 859, 874, 810 P.2d 888 (1991).

[99] *State v. Ford*, 110 Wn.2d 827, 833, 755 P.2d 806 (1988)("The ultimate concern of the judiciary is that the methods approved result in an accurate test, competently administered, so that a defendant is assured that the test results do in fact reflect a reliable and accurate measure of his or her breath content.").

Ludvigsen also asserts that applying the 2004 Amendments affect a vested right. Ludvigsen attempts to create this vested right by linking his interpretation of the law to the general "everyone-knows-the-law" presumption to claim an expectation that the law in effect on the date of his arrest would govern. The argument is without merit.

First, Ludvigsen's claim ignores this court's prior decision in *State v. MacKenzie*, expressly stating that one does not acquire vested rights to the breath test procedures in WAC 448-13. Ludvigsen did not acquire a vested right to WAC 448-13-035 simply because that rule existed on the date of his arrest. As evidenced by other opinions in other contexts, our courts generally allow procedural changes in pending cases.[100]

Ludvigsen then relies upon the general presumption that "people are presumed to know the law" and argues this somehow creates an expectation the State would be bound to the law in effect at his arrest. The argument is misconceived Every sane person is presumed to know the law.[101] However, "the law" of which we speak is the proscribed conduct in penal statutes.[102] Applied herein, Ludvigsen is presumed to know that driving in Washington under the influence of alcohol is a crime. He is not

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[100] See e.g. *State v. Olmos*, 129 Wn. App. 750, 120 P.3d 139 (2005)(motion to dismiss denied where former procedural rule governing speedy trial would have allowed for dismissal for due diligence failures, but speedy trial rules in effect at time of hearing revised to specifically exclude *Striker/Greenwood* due diligence claims); *State v. Rogers,* 127 Wn.2d 270, 278-79, 898 P.2d 294 (1995)(legal obligation under *Baker* extinguished by new requirement for drivers to notify DOL of new address, thus no obligation for DOL to seek driver's address after effective date of amendments).
[101] *State v. Patterson*, 37 Wn. App. 275, 282, 679 P.2d 416, *rev. denied* 103 Wn.2d 1005 (1984).
[102] *State v. Spence*, 81 Wn. 2d 788, 792, 506 P.2d 293 (1973) *rev'd on other grounds*, 418 U.S. 405, 94 S.Ct. 2727 (1974)(voluntary act which constitutes a crime is all that is necessary and defendant is presumed to know those acts prohibited by law); *State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981) *cert den.*, 456 U.S. 1006 (1982).

presumed to know the intricacies of criminal procedure or constitutional law. Ludvigsen is not presumed to know the administrative procedures governing the admissibility of breath tests on the date of his breath test.

Ludvigsen then attempts to bootstrap his misconceived "reasonable expectation" argument into a claim he did not make a "knowing and intelligent" decision to provide the breath test. As noted above, Ludvigsen did not establish any expectation to the breath test procedures in effect. Even if he established such an expectation, he does not establish a vested right by his mere anticipation in the continuance of existing law.[103] There is no vested right in an existing law which precludes its amendment or repeal nor a vested right in the omission to legislate on a particular subject.[104]

Substantively, his argument is similar to that rejected in *State v. Bostrom.*[105] In *Bostrom*, the defense admitted the warnings given to him accurately reflected the requirements of RCW 46.2.308, but argued they should have been provided additional warnings beyond those required by the statute.[106] The *Bostrom* court noted that the defense misinterpreted their prior holdings to imply a legal requirement that does not exist:

> While we remarked that one of the Legislature's purposes in enacting the implied consent warnings is to provide drivers an opportunity to make an informed decision whether to refuse a breath test, we did not mean to suggest that this underlying purpose was a requirement which overrode the plain language of the statute. *Whitman*, 105 Wn.2d at 281; *Gonzales*, 12 Wn.2d at

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[103] *Godrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975).
[104] *Id.*, citing *Henry v. McKay*, 164 Wash. 526 , 3 P.2d 145 (1931).
[105] *State v. Bostrom*, 127 Wn.2d 580, 902 P.2d 157 (1995).
[106] *Bostrom*, 127 Wn.2d at 586.

> 897. When the language of a statute is unambiguous, courts may not alter the statute's plain meaning by construction. E.g. *Department of Licensing v. Lax*, 125 Wn.2d 818, 822, 888 P.2d 1190 (1995); *State v. Johnson*, 119 Wn.2d 167, 172, 829 P.2d 1082 (1992). **We are therefore, not free to graft onto the implied consent statute any additional warnings not contained in the plain language of that statute.**[107]

Bostrom explains that the prohibition on "misleading or misstated" warnings are limited to analyzing warnings *required by the statute*. Due process does not require warnings that the defendant might find helpful or less confusing, but were not included by the legislature.[108] As with the defendant in *Bostrom*, Ludvigsen had no legal right to *any* warnings regarding the consequences of taking or refusing the alcohol tests, they are a matter of legislative grace.[109]

Ludvigsen has the burden herein to prove beyond-a-reasonable-doubt his claim of unconstitutionality based upon a due process violation. Neither his factual assertions nor his legal citations support a claim that a vested right to a driver's license was violated by any governmental failure to properly advise him.

Finally, Ludvigsen briefly argues that applying the 2004 Amendments in his case threatens to extinguish a vested property right to his driving privilege. His failure to previously raise this argument

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[107] *Bostrom*, 127 Wn.2d at 586-87 (emphasis added).

[108] See also *Roethle v. Dept. of Licensing*, 45 Wn. App. 607, 610, 726 P.2d 1001 (1986)(court will not infer a warning the implied consent statute does not contain); *Moffit v. City of Bellevue*, 87 Wn. App. 144 (1997)(police are not free to graft language onto the implied consent warning that is not contained in the plain language of the statute); *State v. McNichols*, 128 Wn.2d 242, 249, 906 P.2d 329 (1995) (Courts are not free to graft language onto the implied consent statute).

[109] *Bostrom*, 127 Wn.2d at 590; *Nichols*, 128 Wn.2d at 249.

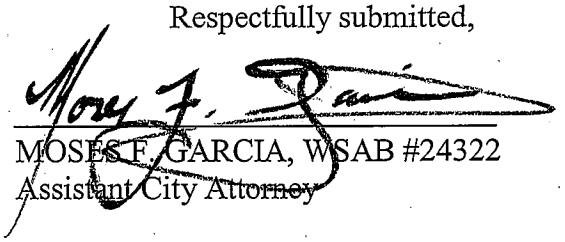
deprives the court of any facts to support his claim.[110] Specifically, whether any evidence supports his claim that he had a driver's license and what facts support his claim that he was not properly informed. Revoking the license of someone who was not read the implied consent warning would violate procedural due process.[111] Ludvigsen does not argue he was not provided exactly the warnings required by RCW 46.20.308. Instead, he merely reargues the failed position in *Bostrom*, that the failure to provide more than the mandatory warnings prescribed by the statute was error. As in *Bostrom*, Ludvigsen's argument fails.

C. CONCLUSION

Washington follows the presumption that laws and rules relating to procedure apply to all pending cases upon their effective date. A DUI defendant has no legal right to the procedural or evidence rules in effect on the date of his crime. The RALJ court properly concluded a trial court applies the procedural rules in effect on the date of the hearing in a pending case.

DATED this 15th day of November, 2006.

Respectfully submitted,



MOSES F. GARCIA, WSAB #24322
Assistant City Attorney

[110] RAP 2.5(a) Errors Raised for First Time on Review.
[111] *Gibson v. Department of Licensing*, 54 Wn. App. 188, 195, 773 P.2d 110 (1989).

APPENDIX A

(2) The electrical board and the board of boiler rules shall jointly evaluate whether electrical licensing, certification, inspection, and permitting requirements should apply to maintenance work on the electrical controls of a boiler performed by an employee of a service company. The electrical board shall report their joint findings and recommendations for legislation or rule making, if any, to the commerce and labor committee of the house of representatives and the commerce and trade committee of the senate by December 1, ~~2003~~ 2004.

(3) This section expires July 1, ~~2004~~ 2005.

Approved March 22, 2004.

Effective June 10, 2004.

DUI TEST—ADMISSIBILITY

CHAPTER 68

S.H.B. No. 3055

AN ACT Relating to admissibility of DUI tests; amending RCW 46.61.506; reenacting and amending RCW 46.20.308 and 46.20.3101; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature finds that previous attempts to curtail the incidence of driving while intoxicated have been inadequate. The legislature further finds that property loss, injury, and death caused by drinking drivers continue at unacceptable levels. This act is intended to convey the seriousness with which the legislature views this problem. To that end the legislature seeks to ensure swift and certain consequences for those who drink and drive.

To accomplish this goal, the legislature adopts standards governing the admissibility of tests of a person's blood or breath. These standards will provide a degree of uniformity that is currently lacking, and will reduce the delays caused by challenges to various breath test instrument components and maintenance procedures. Such challenges, while allowed, will no longer go to admissibility of test results. Instead, such challenges are to be considered by the finder of fact in deciding what weight to place upon an admitted blood or breath test result.

The legislature's authority to adopt standards governing the admissibility of evidence involving alcohol is well established by the Washington Supreme Court. See generally *State v. Long*, 113 Wn.2d 266, 778 P.2d 1027 (1989); *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantive law").

Sec. 2. RCW 46.20.308 and 1999 c 331 s 2 and 1999 c 274 s 2 are each reenacted and amended to read as follows:

(1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503. Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.

(2) The test or tests of breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or the person to have been driving or in actual physical control of a motor

vehicle while having alcohol in a concentration in violation of RCW 46.61.503 in his or her system and being under the age of twenty-one. However, in those instances where the person is incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample or where the person is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility ~~in which a breath testing instrument is not present~~ or where the officer has reasonable grounds to believe that the person is under the influence of a drug, a blood test shall be administered by a qualified person as provided in RCW 46.61.506~~(4)~~ (5). The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. ~~The officer shall warn the driver that:~~

~~(a) His or her license, permit, or privilege to drive will be revoked or denied if he or she refuses to submit to the test;~~

~~(b) His or her license, permit, or privilege to drive will be suspended, revoked, or denied if the test is administered and the test indicates the alcohol concentration of the person's breath or blood is 0.08 or more, in the case of a person age twenty-one or over, or in violation of RCW 46.61.502, 46.61.503, or 46.61.504 in the case of a person under age twenty-one; and~~

~~(c) His or her refusal to take the test may be used in a criminal trial.~~ The officer shall warn the driver, in substantially the following language, that:

(a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and

(b) If the driver refuses to take the test, the driver will not be eligible for an occupational permit; and

(c) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and

(d) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if the driver is age twenty-one or over and the test indicates the alcohol concentration of the driver's breath or blood is 0.08 or more, or if the driver is under age twenty-one and the test indicates the alcohol concentration of the driver's breath or blood is 0.02 or more, or if the driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504.

(3) Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of vehicular homicide as provided in RCW 46.61.520 or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested.

(4) Any person who is dead, unconscious, or who is otherwise in a condition rendering him or her incapable of refusal, shall be deemed not to have withdrawn the consent provided by subsection (1) of this section and the test or tests may be administered, subject to the provisions of RCW 46.61.506, and the person shall be deemed to have received the warnings required under subsection (2) of this section.

(5) If, following his or her arrest and receipt of warnings under subsection (2) of this section, the person arrested refuses upon the request of a law enforcement officer to submit to a test or tests of his or her breath or blood, no test shall be given except as authorized under subsection (3) or (4) of this section.

(6) If, after arrest and after the other applicable conditions and requirements of this section have been satisfied, a test or tests of the person's blood or breath is administered and the test results indicate that the alcohol concentration of the person's breath or blood is 0.08 or more if the person is age twenty-one or over, or ~~is in violation of RCW 46.61.502, 46.61.503, or 46.61.504~~ 0.02 or more if the person is under the age of twenty-one, or the person refuses to submit to a test, the arresting officer or other law enforcement officer at whose direction any test has been given, or the department, where applicable, if the arrest results in a test of the person's blood, shall:

(a) Serve notice in writing on the person on behalf of the department of its intention to suspend, revoke, or deny the person's license, permit, or privilege to drive as required by subsection (7) of this section;

(b) Serve notice in writing on the person on behalf of the department of his or her right to a hearing, specifying the steps he or she must take to obtain a hearing as provided by subsection (8) of this section;

(c) Mark the person's Washington state driver's license or permit to drive, if any, in a manner authorized by the department;

(d) Serve notice in writing that the marked license or permit, if any, is a temporary license that is valid for sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or until the suspension, revocation, or denial of the person's license, permit, or privilege to drive is sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first. No temporary license is valid to any greater degree than the license or permit that it replaces; and

(e) Immediately notify the department of the arrest and transmit to the department within seventy-two hours, except as delayed as the result of a blood test, a sworn report or report under a declaration authorized by RCW 9A.72.085 that states:

(i) That the officer had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or was under the age of twenty-one years and had been driving or was in actual physical control of a motor vehicle while having an alcohol concentration in violation of RCW 46.61.503;

(ii) That after receipt of the warnings required by subsection (2) of this section the person refused to submit to a test of his or her blood or breath, or a test was administered and the results indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person is age twenty-one or over, or was ~~in violation of RCW 46.61.502, 46.61.503, or 46.61.504~~ 0.02 or more if the person is under the age of twenty-one; and

(iii) Any other information that the director may require by rule.

(7) The department of licensing, upon the receipt of a sworn report or report under a declaration authorized by RCW 9A.72.085 under subsection (6)(e) of this section, shall suspend, revoke, or deny the person's license, permit, or privilege to drive or any nonresident operating privilege, as provided in RCW 46.20.3101, such suspension, revocation, or denial to be effective beginning sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or when sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first.

(8) A person receiving notification under subsection (6)(b) of this section may, within thirty days after the notice has been given, request in writing a formal hearing before the department. The person shall pay a fee of one hundred dollars as part of the request. If the request is mailed, it must be postmarked within thirty days after receipt of the notification. Upon timely receipt of such a request for a formal hearing, including receipt of the required one hundred dollar fee, the department shall afford the person an opportunity for a hearing. The department may waive the required one hundred dollar fee if the person is an indigent as defined in RCW 10.101.010. Except as otherwise provided in this section, the hearing is subject to and shall be scheduled and conducted in accordance with RCW 46.20.329 and 46.20.332. The hearing shall be conducted in the county of the arrest, except that all or part of the hearing may, at the discretion of the department, be conducted by telephone or other electronic means. The hearing shall be held within sixty days following the arrest or following the date notice has been given in the event notice is given by the department following a blood test, unless otherwise agreed to by the department and the person, in which case the action by the department shall be stayed, and any valid temporary license marked under subsection (6)(c) of this section extended, if the person is otherwise eligible for licensing. For the purposes of this section, the scope of the hearing shall cover the issues of whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a

concentration ~~in violation of RCW 46.61.503 and~~ of 0.02 or more if the person was under the age of twenty-one, whether the person was placed under arrest, and (a) whether the person refused to submit to the test or tests upon request of the officer after having been informed that such refusal would result in the revocation of the person's license, permit, or privilege to drive, or (b) if a test or tests were administered, whether the applicable requirements of this section were satisfied before the administration of the test or tests, whether the person submitted to the test or tests, or whether a test was administered without express consent as permitted under this section, and whether the test or tests indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person was age twenty-one or over at the time of the arrest, or ~~was in violation of RCW 46.61.502, 46.61.503, or 46.61.504~~ 0.02 or more if the person was under the age of twenty-one at the time of the arrest. The sworn report or report under a declaration authorized by RCW 9A.72.085 submitted by a law enforcement officer is prima facie evidence that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or the person had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration ~~in violation of RCW 46.61.503~~ of 0.02 or more and was under the age of twenty-one and that the officer complied with the requirements of this section.

A hearing officer shall conduct the hearing, may issue subpoenas for the attendance of witnesses and the production of documents, and shall administer oaths to witnesses. The hearing officer shall not issue a subpoena for the attendance of a witness at the request of the person unless the request is accompanied by the fee required by RCW 5.56.010 for a witness in district court. The sworn report or report under a declaration authorized by RCW 9A.72.085 of the law enforcement officer and any other evidence accompanying the report shall be admissible without further evidentiary foundation and the certifications authorized by the criminal rules for courts of limited jurisdiction shall be admissible without further evidentiary foundation. The person may be represented by counsel, may question witnesses, may present evidence, and may testify. The department shall order that the suspension, revocation, or denial either be rescinded or sustained.

(9) If the suspension, revocation, or denial is sustained after such a hearing, the person whose license, privilege, or permit is suspended, revoked, or denied has the right to file a petition in the superior court of the county of arrest to review the final order of revocation by the department in the same manner as an appeal from a decision of a court of limited jurisdiction. Notice of appeal must be filed within thirty days after the date the final order is served or the right to appeal is waived. Notwithstanding RCW 46.20.334, RALJ 1.1, or other statutes or rules referencing de novo review, the appeal shall be limited to a review of the record of the administrative hearing. The appellant must pay the costs associated with obtaining the record of the hearing before the hearing officer. The filing of the appeal does not stay the effective date of the suspension, revocation, or denial. A petition filed under this subsection must include the petitioner's grounds for requesting review. Upon granting petitioner's request for review, the court shall review the department's final order of suspension, revocation, or denial as expeditiously as possible. The review must be limited to a determination of whether the department has committed any errors of law. The superior court shall accept those factual determinations supported by substantial evidence in the record: (a) That were expressly made by the department; or (b) that may reasonably be inferred from the final order of the department. The superior court may reverse, affirm, or modify the decision of the department or remand the case back to the department for further proceedings. The decision of the superior court must be in writing and filed in the clerk's office with the other papers in the case. The court shall state the reasons for the decision. If judicial relief is sought for a stay or other temporary remedy from the department's action, the court shall not grant such relief unless the court finds that the appellant is likely to prevail in the appeal and that without a stay the appellant will suffer irreparable injury. If the court stays the suspension, revocation, or denial it may impose conditions on such stay.

(10) If a person whose driver's license, permit, or privilege to drive has been or will be suspended, revoked, or denied under subsection (7) of this section, other than as a result of a breath or blood test refusal, and who has not committed an offense for which he or she was granted a deferred prosecution under chapter 10.05 RCW, petitions a court for a deferred

prosecution on criminal charges arising out of the arrest for which action has been or will be taken under subsection (7) of this section, the court may direct the department to stay any actual or proposed suspension, revocation, or denial for at least forty-five days but not more than ninety days. If the court stays the suspension, revocation, or denial, it may impose conditions on such stay. If the person is otherwise eligible for licensing, the department shall issue a temporary license, or extend any valid temporary license marked under subsection (6) of this section, for the period of the stay. If a deferred prosecution treatment plan is not recommended in the report made under RCW 10.05.050, or if treatment is rejected by the court, or if the person declines to accept an offered treatment plan, or if the person violates any condition imposed by the court, then the court shall immediately direct the department to cancel the stay and any temporary marked license or extension of a temporary license issued under this subsection.

A suspension, revocation, or denial imposed under this section, other than as a result of a breath or blood test refusal, shall be stayed if the person is accepted for deferred prosecution as provided in chapter 10.05 RCW for the incident upon which the suspension, revocation, or denial is based. If the deferred prosecution is terminated, the stay shall be lifted and the suspension, revocation, or denial reinstated. If the deferred prosecution is completed, the stay shall be lifted and the suspension, revocation, or denial canceled.

(11) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this state has been suspended, revoked, or denied, the department shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he or she has a license.

Sec. 3. RCW 46.20.3101 and 1998 c 213 s 2, 1998 c 209 s 2, and 1998 c 207 s 8 are each reenacted and amended to read as follows:

Pursuant to RCW 46.20.308, the department shall suspend, revoke, or deny the arrested person's license, permit, or privilege to drive as follows:

(1) In the case of a person who has refused a test or tests:

(a) For a first refusal within seven years, where there has not been a previous incident within seven years that resulted in administrative action under this section, revocation or denial for one year;

(b) For a second or subsequent refusal within seven years, or for a first refusal where there has been one or more previous incidents within seven years that have resulted in administrative action under this section, revocation or denial for two years or until the person reaches age twenty-one, whichever is longer. A revocation imposed under this subsection (1)(b) shall run consecutively to the period of any suspension, revocation, or denial imposed pursuant to a criminal conviction arising out of the same incident.

(2) In the case of an incident where a person has submitted to or been administered a test or tests indicating that the alcohol concentration of the person's breath or blood was 0.08 or more:

(a) For a first incident within seven years, where there has not been a previous incident within seven years that resulted in administrative action under this section, suspension for ninety days;

(b) For a second or subsequent incident within seven years, revocation or denial for two years.

(3) In the case of an incident where a person under age twenty-one has submitted to or been administered a test or tests indicating that the alcohol concentration of the person's breath or blood was ~~in violation of RCW 46.61.502, 46.61.503, or 46.61.504~~ 0.02 or more:

(a) For a first incident within seven years, suspension or denial for ninety days;

(b) For a second or subsequent incident within seven years, revocation or denial for one year or until the person reaches age twenty-one, whichever is longer.

Sec. 4. RCW 46.61.506 and 1998 c 213 s 6 are each amended to read as follows:

(1) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle

while under the influence of intoxicating liquor or any drug, if the person's alcohol concentration is less than 0.08, it is evidence that may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor or any drug.

(2) The breath analysis shall be based upon grams of alcohol per two hundred ten liters of breath. The foregoing provisions of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor or any drug.

(3) Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose. The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.

(4)(a) A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of the following:

(i) The person who performed the test was authorized to perform such test by the state toxicologist;

(ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test;

(iii) The person being tested did not have any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period;

(iv) Prior to the start of the test, the temperature of the simulator solution as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade;

(v) The internal standard test resulted in the message "verified";

(vi) The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist;

(vii) The simulator external standard result did lie between .072 to .088 inclusive; and

(viii) All blank tests gave results of .000.

(b) For purposes of this section, "prima facie evidence" is evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. In assessing whether there is sufficient evidence of the foundational facts, the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.

(c) Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. Such challenges, however, shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.

(5) When a blood test is administered under the provisions of RCW 46.20.308, the withdrawal of blood for the purpose of determining its alcoholic or drug content may be performed only by a physician, a registered nurse, ~~or a qualified technician~~ a licensed practical nurse, a nursing assistant as defined in chapter 18.88A RCW, a physician assistant as defined in chapter 18.71A RCW, a first responder as defined in chapter 18.73 RCW, an emergency medical technician as defined in chapter 18.73 RCW, a health care assistant as defined in chapter 18.135 RCW, or any technician trained in withdrawing blood. This limitation shall not apply to the taking of breath specimens.

~~(5)~~ (6) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his or her own choosing administer one or more

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~~(6)~~ (7) Upon the request of the person who shall submit to a test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or her or his or her attorney.

Approved March 22, 2004.

Effective June 10, 2004.

CRIMINAL TRESPASS LAW—DEFINITIONS

CHAPTER 69

S.B. No. 6357

AN ACT Relating to enhancements to criminal trespass law; and amending RCW 9A.52.010.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 9A.52.010 and 1985 c 289 s 1 are each amended to read as follows:

The following definitions apply in this chapter:

(1) "Premises" includes any building, dwelling, structure used for commercial aquaculture, or any real property;

(2) "Enter". The word "enter" when constituting an element or part of a crime, shall include the entrance of the person, or the insertion of any part of his body, or any instrument or weapon held in his hand and used or intended to be used to threaten or intimidate a person or to detach or remove property;

(3) "Enters or remains unlawfully". A person "enters or remains unlawfully" in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain.

A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him by the owner of the land or some other authorized person, or unless notice is given by posting in a conspicuous manner. Land that is used for commercial aquaculture or for growing an agricultural crop or crops, other than timber, is not unimproved and apparently unused land if a crop or any other sign of cultivation is clearly visible or if notice is given by posting in a conspicuous manner. Similarly, a field fenced in any manner is not unimproved and apparently unused land. A license or privilege to enter or remain on improved and apparently used land that is open to the public at particular times, which is neither fenced nor otherwise enclosed in a manner to exclude intruders, is not a license or privilege to enter or remain on the land at other times if notice of prohibited times of entry is posted in a conspicuous manner;

(4) "Data" means a representation of information, knowledge, facts, concepts, or instructions that are being prepared or have been prepared in a formalized manner and are intended for use in a computer;

(5) "Computer program" means an ordered set of data representing coded instructions or statements that when executed by a computer cause the computer to process data;

APPENDIX B

WSR 04-12-050

PREPROPOSAL STATEMENT OF INQUIRY

WASHINGTON STATE TOXICOLOGIST

[Filed May 28, 2004, 12:37 p.m.]

Subject of Possible Rule Making: Administration of breath alcohol test.

Statutes Authorizing the Agency to Adopt Rules on this Subject: RCW 46.61.506.

Reasons Why Rules on this Subject may be Needed and What They Might Accomplish: Changes to RCW 46.61.506 have made sections of the current chapter 448-13 WAC redundant. The state toxicologist is contemplating significant amendments to the rules, repealing many obsolete and redundant provisions, and moving others from the Washington Administrative Code to agency policy and procedures.

Process for Developing New Rule: Pilot rule making.

Interested parties can participate in the decision to adopt the new rule and formulation of the proposed rule before publication by contacting Barry K. Logan, Ph.D., DABFT, Washington State Toxicologist, 2203 Airport Way South, Suite 360, Seattle, WA 98134, (206) 262-6000.

May 27, 2004

Barry K. Logan

Washington State Toxicologist

Legislature **Code Reviser** **Register**

APPENDIX C

WSR 04-12-051

EMERGENCY RULES

WASHINGTON STATE TOXICOLOGIST

[Filed May 28, 2004, 12:38 p.m. , effective June 10, 2004]

Date of Adoption: May 27, 2004.

Purpose: The purpose of this emergency rule making is to indicate approval by the state toxicologist of thermometers used in the breath alcohol testing program.

Citation of Existing Rules Affected by this Order: Amending WAC 448-13-020.

Statutory Authority for Adoption: RCW 46.61.506.

Under RCW 34.05.350 the agency for good cause finds that state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this Finding: Chapter 68, Laws of 2004 (SHB 3055), effective June 10, 2004, amends RCW 46.61.506(4) to require that prior to the start of a breath alcohol test, the temperature of the simulator solution must be measured by a thermometer approved of by the state toxicologist. It is therefore necessary for the state toxicologist to approve thermometers on or before June 10, 2004.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 1, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

May 27, 2004

Barry K. Logan, Ph.D.

Washington State Toxicologist

[AMENDATORY SECTION (Amending WSR 95-20-025, filed 9/27/95)]**WAC 448-13-020 Approval of breath test ((~~instruments~~)) equipment.** ((~~Pursuant to RCW 46.61.506, the DataMaster is the only breath test instrument approved by the state toxicologist as a device for the measurement of alcohol in a person's breath. A simulator filled with a certified simulator solution will be attached to each instrument to provide a known external standard as defined in WAC 448-13-030(13). The simulator used must be on the National Highway Traffic Safety Administration (NHTSA) conforming products list. Any agency, group, or individual seeking approval or certification from the state toxicologist for the use of other breath test instruments for evidential breath testing programs in the state of Washington should contact the state toxicologist at the address given in WAC 448-13-210.~~)) (1) Pursuant to RCW 46.61.506, the following instruments are approved for the quantitative measurement of alcohol in a person's breath:

(a) The DataMaster.

(2) Pursuant to RCW 46.61.506, the following thermometers are approved:

(a) Mercury in glass thermometers with a scale graduated in tenths of a degree measuring a range between 33.5 and 34.5 degrees centigrade; and

(b) Digital thermometer system contained within the Guth 2100 wet bath simulator.

[Statutory Authority: RCW 46.61.506. 95-20-025, § 448-13-020, filed 9/27/95, effective 10/28/95; 91-21-040, § 448-13-020, filed 10/11/91, effective 11/11/91; 91-06-022, § 448-13-020, filed 2/26/91, effective 3/29/91.]

Reviser's note: The bracketed material preceding the section above was supplied by the code reviser's office.

APPENDIX D

WSR 04-16-062

PROPOSED RULES

STATE TOXICOLOGIST

[Filed July 30, 2004, 1:21 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 04-12-050.

Title of Rule and Other Identifying Information: Administration of breath test program.

Hearing Location(s): Washington State Patrol, Forensic Laboratory Services Bureau, 2203 Airport Way South, Suite 360, Seattle, WA 98134, on September 7, 2004, at 9:00 a.m.

Date of Intended Adoption: September 14, 2004.

Submit Written Comments to: Barry K. Logan, Ph.D., Washington State Toxicologist, 2203 Airport Way South, Suite 360, Seattle, WA 98134, e-mail barry.logan@wsp.wa.gov, fax (206) 262-6018, by August 31, 2004.

Assistance for Persons with Disabilities: Contact Kitty Jacobs by August 31, 2004, (206) 262-6000.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Changes to RCW 46.61.506 have made sections of the current chapter 448-13 WAC redundant. The changes repeal many obsolete and redundant provisions, and move others from the Washington Administrative Code to agency policy and procedures. The proposed changes in rules are designed to simplify the administration of the breath alcohol test program used by law enforcement agencies, and administered by the Washington State Patrol. Due to the significant scope of changes, the prior rules chapter 448-13 WAC are being struck in their entirety and replaced with proposed chapter 448-16 WAC.

Reasons Supporting Proposal: The proposed rules are keyed specifically to the authority delegated in RCW 46.61.506 to the state toxicologist. The statute as revised and effective June 10th, 2004, states "The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist."

Statutory Authority for Adoption: RCW 46.61.506.

Statute Being Implemented: RCW 46.61.506.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Barry K. Logan, Ph.D., governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Barry K. Logan, Ph.D., 2203 Airport Way South, Suite 360, Seattle, WA 98134, (206) 262-6000.

No small business economic impact statement has been prepared under chapter 19.85 RCW. No small business impact. Only regulates government agencies.

A cost-benefit analysis is not required under RCW 34.05.328. Agency compliance not required per subsection (5)(a)(i).

July 30, 2004

Barry K. Logan, Ph.D.

Washington State Toxicologist

REPEALER

The following chapter of the Washington Administrative Code is repealed:

Chapter 448-13 WAC Administration of breath test program.
Chapter 448-16 WAC

ADMINISTRATION OF BREATH TEST PROGRAM
NEW SECTION
WAC 448-16-010 Basis for rules governing breath testing. In RCW 46.61.506(4), the legislature establishes criteria for the admissibility of breath alcohol test evidence. RCW 46.61.506(3) authorizes and directs the state toxicologist to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits to those individuals. These rules are intended to implement the direction of the statute by 1) approving instruments and associated equipment capable of performing a reliable breath alcohol test, 2) identifying classifications of individuals who are to be examined for their competence to conduct such tests, and operate or maintain that equipment, and 3) identifying certain aspects of the operation of that equipment, necessary for reliable testing.

[]

NEW SECTION
WAC 448-16-020 Approval of breath test equipment. (1) Pursuant to RCW 46.61.506, the following instruments are approved for the quantitative measurement of alcohol in a person's breath:

a) The DataMaster.

b) The DataMaster CDM.

(2) Pursuant to RCW 46.61.506, the following thermometers are approved:

a) Mercury in glass thermometers with a scale graduated in tenths of a degree measuring a range

between 33.5 and 34.5 degrees centigrade.

b) Digital thermometer system contained within the Guth 2100 wet bath simulator.

[]

NEW SECTION

WAC 448-16-030 Definitions. (1) "Accuracy" means the proximity of a measured value to a reference value.

(2) "Alcohol" means the unique chemical compound ethyl alcohol.

(3) "Blank test" means the testing of an instrument to ensure that no alcohol from a previous test can interfere with a person's breath test.

(4) "Concentration" means the weight amount of alcohol, expressed in grams, contained in two hundred ten liters of breath or alcohol/water vapor.

(5) "Data entry" means the process of providing information through a keyboard to the instrument for the purposes of (a) identifying a breath test document to an individual and (b) statistical analysis.

(6) "Interference" means a test result whose infrared absorbance properties are not consistent with ethanol.

(7) "End expiratory air" means the last portion of breath to be delivered to the instrument once the appropriate sample acceptance criteria have been met.

(8) "External standard test" means the use of a simulator containing a certified simulator solution, to provide a known alcohol vapor concentration to test the accuracy and proper working order of the instrument. This test of the function of the instrument is performed with every breath test. The external standard test does not calibrate the instrument.

(9) "Internal standard test" means the use of a quartz filter to provide a check that the instrument has maintained calibration since the last time calibration was performed and is in proper working order at the time of the test.

(10) "Precision" means the ability of a technique to perform a measurement in a reproducible manner.

(11) "Simulator" means a device which when filled with a certified simulator solution, maintained at a known temperature, provides a vapor sample of known alcohol concentration.

(12) "Valid breath sample" means a sample of a person's breath provided in such a manner to be accepted for analysis by the instrument.

[]

NEW SECTION

WAC 448-16-040 Foreign substances, interference, and invalid samples. (1) A determination as to whether a subject has a foreign substance in his or her mouth shall be made by either an examination of the mouth or a denial by the person that he or she has any foreign substances in their mouth. A test mouthpiece is not considered a foreign substance for purposes of RCW 46.61.506.

(2) If a subject is wearing jewelry or ornamentation pierced through their tongue, lips, cheek, or other soft tissues in the oral cavity, they will be required to remove this prior to conducting the breath test. If the subject declines, they will be deemed to have a physical limitation rendering them incapable of providing a valid breath sample and will be required to provide a blood sample under the implied consent statute, RCW 46.20.308.

(3) If during a breath test, interference is detected, this will invalidate the test. The subject will be required to repeat the test. A subject whose breath registers the presence of interference on two or more successive breaths shall be deemed to have a physical limitation rendering them incapable of providing a valid breath sample and will be required to provide a blood sample under the implied consent statute, RCW 46.20.308.

(4) In the event that the instrument records an "invalid sample" result at any point during the subject's test, that subject's test should be readministered, after again determining that the subject has no foreign substance in their mouth as outlined in WAC 448-16-040(1), and repeating the fifteen minute observation period.

□

NEW SECTION

WAC 448-16-050 Test defined. A test of a person's breath for alcohol concentration shall consist of the person insufflating end-expiratory air samples at least twice into the instrument, sufficient to allow two separate measurements. There will be sufficient time between the provision of each sample to permit the instrument to measure each sample individually. Two valid breath samples, provided consecutively, will constitute one test.

The instrument will perform this test according to the following protocol when being employed to quantitatively measure an individual's breath alcohol concentration. Successful compliance with each step of this protocol is determined from an inspection of the printout of results. These steps are necessary to ensure accuracy, precision, and confidence in each test.

Step 1. Data entry.

Step 2. Blank test with a result of .000.

Step 3. Internal standard verified.

Step 4. First breath sample provided by subject.

Step 5. Blank test with a result of .000.

Step 6. External standard simulator solution test. The result of this test must be between .072 and .088 inclusive.

Step 7. Blank test with a result of .000.

Step 8. Second breath sample provided by subject.

Step 9. Blank test with a result of .000.

Step 10. Printout of results.

[]

NEW SECTION

WAC 448-16-060 Determining agreement of duplicate breath samples. Pursuant to RCW 46.61.506 the following method is approved for determining whether two breath samples agree to within plus or minus ten percent of their mean.

(1) The breath test results shall be reported, truncated to three decimal places.

(2) The mean of the two breath test results shall be calculated and rounded to four decimal places.

(3) The lower acceptable limit shall be determined by multiplying the above mean by 0.9, and truncating to three decimal places.

(4) The upper acceptable limit shall be determined by multiplying the mean by 1.1 and truncating to three decimal places.

(5) If the results fall within and inclusive of the upper and lower acceptable limits, the two breath samples are valid.

[]

NEW SECTION

WAC 448-16-070 Review, approval, and authorization of protocols of procedures and methods by the state toxicologist. The state toxicologist shall review, approve, and authorize such protocols of procedures and methods (of the toxicologist's own promulgation or submitted by outside agencies or individuals for consideration) required in the administration of the breath test program. Such review, approval, and authorization will be so signified by a signed statement attached to each protocol, and kept on file by the Washington State Patrol. These protocols will be updated as necessary to maintain the quality of the breath test program.

[]

NEW SECTION

WAC 448-16-080 Instructors. The state toxicologist shall certify persons found to be competent and qualified, as "instructors." Instructors are authorized to administer breath tests for alcohol concentration using approved instruments and are further authorized to train and certify as operators, according to outlines approved by the state toxicologist, those persons the instructor finds qualified to administer the breath test utilizing approved instruments. Instructors who are also certified as PBT technicians may

instruct other individuals as PBT technicians according to the approved outlines. Details of persons certified as instructors shall be maintained by the state toxicologist and available upon request.

If an instructor fails or refuses to demonstrate to the state toxicologist or to his representative, that they have the ability to adequately perform their responsibilities as an instructor, then the state toxicologist will suspend their permit.

[]

NEW SECTION

WAC 448-16-090 Operators. The state toxicologist, or certified instructors shall certify as "operators" persons found by them to be competent and qualified to administer breath tests for alcohol concentration using approved breath testing instruments. Persons who have attended courses in the operation of approved breath testing instruments taught by an instructor qualified by the state toxicologist, upon certification of attendance and qualification, shall be designated as "operators." Details of persons so certified shall be maintained by the state toxicologist and available upon request.

If an operator fails or refuses to demonstrate to the state toxicologist or to a certified instructor, that he or she has the ability to adequately perform his or her responsibilities as an operator, then the state toxicologist will suspend their permit.

[]

NEW SECTION

WAC 448-16-100 Solution changers. The state toxicologist, or certified instructors, shall certify as "solution changers" operators found by them to be competent and qualified. In addition to being qualified as "operators" these persons must receive approved instruction covering the changing of simulator external standard solutions for approved breath test instruments, taught by an instructor qualified by the state toxicologist. Details of persons so certified shall be maintained by the state toxicologist and available upon request.

If a solution changer fails or refuses to demonstrate to the state toxicologist or to a certified instructor, that he or she has the ability to adequately perform his or her responsibilities as a solution changer, then the state toxicologist will suspend their permit.

[]

NEW SECTION

WAC 448-16-110 Technicians. The state toxicologist shall certify as "technicians" such persons found to be competent and qualified to maintain the proper working order of breath test instruments through adjustment, repair, and regular service. Details of persons so certified shall be maintained by the state toxicologist and available upon request.

Technicians are authorized to perform maintenance, calibration and instruction in the use of the portable breath test devices. Technicians are also authorized to instruct persons otherwise qualified as "technicians", "instructors," "operators," and "solution changers" according to training outlines approved by the state toxicologist. Certified technicians are themselves authorized to perform the duties of "instructors," "operators," and "solution changers."

If a technician fails or refuses to demonstrate to the state toxicologist or his representative, that he or she has the ability to adequately perform his or her responsibilities as a technician, then the state toxicologist will suspend their permit.

[]

NEW SECTION

WAC 448-16-120 Permit cards. Pursuant to RCW 46.61.506, the state toxicologist shall authorize the issuance to persons deemed qualified as "instructors," "operators," "solution changers" or "technicians," a wallet-sized card bearing his or her name and designation. Permit cards shall bear the signature or facsimile signature of the state toxicologist. Such permit cards shall expire three years after the date on the card, unless renewed for a like three-year period. Operators whose authorization expires may take recertification training within ninety days following expiration of their prior certification, but are not certified to perform any evidential breath tests during that period. Once ninety days have elapsed after the expiration of authorization, the operator must repeat the basic certification training.

[]

NEW SECTION

WAC 448-16-130 Review, approval, and authorization by the state toxicologist of training courses and outlines. The state toxicologist shall approve and authorize such courses and course outlines (of his own promulgation or submitted for consideration by outside agencies or individuals) required in the training of breath test program personnel. Such review, approval, and authorization will be so signified by a signed statement attached to each course outline. These course outlines may be reviewed and updated as necessary to maintain the quality of the breath test program. Instructors are directed to use only approved outlines in conducting the training of operators. Information concerning currently approved course outlines can be obtained on application to the office of the state toxicologist.

[]

NEW SECTION

WAC 448-16-140 Information concerning technical aspects of the breath test program. Documents used by the state toxicologist and personnel involved in breath testing for the state of Washington, which are available on request include: The simulator solution preparation protocol, alcohol analysis protocol, certification document for simulator solution, affidavit from analyst of simulator solution, data base, quality assurance protocol, quality assurance procedure report, operator course outline, operator refresher course outline, and operator training record. A fee may be charged to cover the cost of providing these copies. Copies of most of these records are available at no charge on a web site maintained by the Washington State Patrol at http://breathtest.wsp.wa.gov/welcome.htm.

[]

Reviser's note: The unnecessary underscoring in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

NEW SECTION

WAC 448-16-150 Address for correspondence. Information regarding instrument records, or the certification of operators, instructors, solution changers, and technicians should be obtained from the Washington State Patrol, Breath Test Section, 811 E. Roanoke, Seattle, WA 98102.

Persons seeking information regarding other aspects of the breath alcohol testing program shall direct their request initially to the State Toxicologist, Washington State Toxicology Laboratory, Forensic Laboratory Services Bureau, Washington State Patrol, 2203 Airport Way S., Seattle, WA 98134.

[]

NEW SECTION

WAC 448-16-160 Severability. If any part or provision of these rules or regulations or the application thereof is held invalid, such invalidity shall not affect other provisions or applications of these rules which can be given effect without the invalid provision or application, and to this end any section, paragraph or sentence, is declared to be severable.

[]

APPENDIX E

WSR 04-19-144

PERMANENT RULES

STATE TOXICOLOGIST

[Filed September 22, 2004, 9:24 a.m. , effective October 23, 2004]

Purpose: Adoption of streamlined rules for administration of breath alcohol test. Chapter 68, Laws of 2004 (SHB 3055), effective June 10, 2004, amended RCW 46.61.506 to place requirements for admissibility of breath test results in statute. Chapter 448-13 WAC which previously addressed these issues is being repealed and replaced with chapter 448-16 WAC. Chapter 448-16 WAC follows the direction of the statute to approve methods, equipment and personnel for breath alcohol testing. While many of the sections do not change substantively from those contained in chapter 448-13 WAC, renumbering is intended to simplify the rules and make them easier to read.

Citation of Existing Rules Affected by this Order: Repealing chapter 448-13 WAC.

Statutory Authority for Adoption: RCW 46.61.506.

Adopted under notice filed as WSR 04-16-062 on July 30, 2004.

Changes Other than Editing from Proposed to Adopted Version: No substantive changes.

The proposed WAC has been amended for clarification as follows: "If the subject declines to remove the jewelry or ornamentation, they will be deemed to have a physical limitation rendering them incapable of providing a valid breath sample..." This is not a substantive change.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 16, Amended 0, Repealed 27.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 16, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 16, Amended 0, Repealed 27; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: September 22, 2004.

September 21, 2004

Barry K. Logan PhD

State Toxicologist

REPEALER

The following chapter of the Washington Administrative Code is repealed:

Chapter 448-13 WAC Administration of breath test program.
Chapter 448-16 WAC

ADMINISTRATION OF BREATH TEST PROGRAM
NEW SECTION
WAC 448-16-010 Basis for rules governing breath testing. In RCW 46.61.506(4), the legislature establishes criteria for the admissibility of breath alcohol test evidence. RCW 46.61.506(3) authorizes and directs the state toxicologist to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits to those individuals. These rules are intended to implement the direction of the statute by 1) approving instruments and associated equipment capable of performing a reliable breath alcohol test, 2) identifying classifications of individuals who are to be examined for their competence to conduct such tests, and operate or maintain that equipment, and 3) identifying certain aspects of the operation of that equipment, necessary for reliable testing.

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NEW SECTION
WAC 448-16-020 Approval of breath test equipment. (1) Pursuant to RCW 46.61.506, the following instruments are approved for the quantitative measurement of alcohol in a person's breath:

a) The DataMaster.

b) The DataMaster CDM.

(2) Pursuant to RCW 46.61.506, the following thermometers are approved:

a) Mercury in glass thermometers with a scale graduated in tenths of a degree measuring a range between 33.5 and 34.5 degrees centigrade.

b) Digital thermometer system contained within the Guth 2100 wet bath simulator.

[]

NEW SECTION
WAC 448-16-030 Definitions. (1) "Accuracy" means the proximity of a measured value to a

reference value.

(2) "Alcohol" means the unique chemical compound ethyl alcohol.

(3) "Blank test" means the testing of an instrument to ensure that no alcohol from a previous test can interfere with a person's breath test.

(4) "Concentration" means the weight amount of alcohol, expressed in grams, contained in two hundred ten liters of breath or alcohol/water vapor.

(5) "Data entry" means the process of providing information through a keyboard to the instrument for the purposes of (a) identifying a breath test document to an individual and (b) statistical analysis.

(6) "Interference" means a test result whose infrared absorbance properties are not consistent with ethanol.

(7) "End expiratory air" means the last portion of breath to be delivered to the instrument once the appropriate sample acceptance criteria have been met.

(8) "External standard test" means the use of a simulator containing a certified simulator solution, to provide a known alcohol vapor concentration to test the accuracy and proper working order of the instrument. This test of the function of the instrument is performed with every breath test. The external standard test does not calibrate the instrument.

(9) "Internal standard test" means the use of a quartz filter to provide a check that the instrument has maintained calibration since the last time calibration was performed and is in proper working order at the time of the test.

(10) "Precision" means the ability of a technique to perform a measurement in a reproducible manner.

(11) "Simulator" means a device which when filled with a certified simulator solution, maintained at a known temperature, provides a vapor sample of known alcohol concentration.

(12) "Valid breath sample" means a sample of a person's breath provided in such a manner to be accepted for analysis by the instrument.

□

NEW SECTION

WAC 448-16-040 Foreign substances, interference, and invalid samples. (1) A determination as to whether a subject has a foreign substance in his or her mouth shall be made by either an examination of the mouth or a denial by the person that he or she has any foreign substances in their mouth. A test mouthpiece is not considered a foreign substance for purposes of RCW 46.61.506.

(2) If a subject is wearing jewelry or ornamentation pierced through their tongue, lips, cheek, or other soft tissues in the oral cavity, they will be required to remove this prior to conducting the breath test. If the subject declines to remove the jewelry or ornamentation, they will be deemed to have a physical limitation rendering them incapable of providing a valid breath sample and will be required to provide a

blood sample under the implied consent statute, RCW 46.20.308.

(3) If during a breath test, interference is detected, this will invalidate the test. The subject will be required to repeat the test. A subject whose breath registers the presence of interference on two or more successive breaths shall be deemed to have a physical limitation rendering them incapable of providing a valid breath sample and will be required to provide a blood sample under the implied consent statute, RCW 46.20.308.

(4) In the event that the instrument records an "invalid sample" result at any point during the subject's test, that subject's test should be readministered, after again determining that the subject has no foreign substance in their mouth as outlined in WAC 448-16-040(1), and repeating the fifteen minute observation period.

□

Reviser's note: The unnecessary underscoring in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

NEW SECTION

WAC 448-16-050 Test defined. A test of a person's breath for alcohol concentration shall consist of the person insufflating end-expiratory air samples at least twice into the instrument, sufficient to allow two separate measurements. There will be sufficient time between the provision of each sample to permit the instrument to measure each sample individually. Two valid breath samples, provided consecutively, will constitute one test.

The instrument will perform this test according to the following protocol when being employed to quantitatively measure an individual's breath alcohol concentration. Successful compliance with each step of this protocol is determined from an inspection of the printout of results. These steps are necessary to ensure accuracy, precision, and confidence in each test.

Step 1. Data entry.

Step 2. Blank test with a result of .000.

Step 3. Internal standard verified.

Step 4. First breath sample provided by subject.

Step 5. Blank test with a result of .000.

Step 6. External standard simulator solution test. The result of this test must be between .072 and .088 inclusive.

Step 7. Blank test with a result of .000.

Step 8. Second breath sample provided by subject.

Step 9. Blank test with a result of .000.

Step 10. Printout of results.

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NEW SECTION

WAC 448-16-060 Determining agreement of duplicate breath samples. Pursuant to RCW 46.61.506 the following method is approved for determining whether two breath samples agree to within plus or minus ten percent of their mean.

(1) The breath test results shall be reported, truncated to three decimal places.

(2) The mean of the two breath test results shall be calculated and rounded to four decimal places.

(3) The lower acceptable limit shall be determined by multiplying the above mean by 0.9, and truncating to three decimal places.

(4) The upper acceptable limit shall be determined by multiplying the mean by 1.1 and truncating to three decimal places.

(5) If the results fall within and inclusive of the upper and lower acceptable limits, the two breath samples are valid.

[]

NEW SECTION

WAC 448-16-070 Review, approval, and authorization of protocols of procedures and methods by the state toxicologist. The state toxicologist shall review, approve, and authorize such protocols of procedures and methods (of the toxicologist's own promulgation or submitted by outside agencies or individuals for consideration) required in the administration of the breath test program. Such review, approval, and authorization will be so signified by a signed statement attached to each protocol, and kept on file by the Washington State Patrol. These protocols will be updated as necessary to maintain the quality of the breath test program.

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NEW SECTION

WAC 448-16-080 Instructors. The state toxicologist shall certify persons found to be competent and qualified, as "instructors." Instructors are authorized to administer breath tests for alcohol concentration using approved instruments and are further authorized to train and certify as operators, according to outlines approved by the state toxicologist, those persons the instructor finds qualified to administer the breath test utilizing approved instruments. Instructors who are also certified as PBT technicians may instruct other individuals as PBT technicians according to the approved outlines. Details of persons certified as instructors shall be maintained by the state toxicologist and available upon request.

If an instructor fails or refuses to demonstrate to the state toxicologist or to his representative, that they have the ability to adequately perform their responsibilities as an instructor, then the state toxicologist will suspend their permit.

[]

NEW SECTION

WAC 448-16-090 Operators. The state toxicologist, or certified instructors shall certify as "operators" persons found by them to be competent and qualified to administer breath tests for alcohol concentration using approved breath testing instruments. Persons who have attended courses in the operation of approved breath testing instruments taught by an instructor qualified by the state toxicologist, upon certification of attendance and qualification, shall be designated as "operators." Details of persons so certified shall be maintained by the state toxicologist and available upon request.

If an operator fails or refuses to demonstrate to the state toxicologist or to a certified instructor, that he or she has the ability to adequately perform his or her responsibilities as an operator, then the state toxicologist will suspend their permit.

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NEW SECTION

WAC 448-16-100 Solution changers. The state toxicologist, or certified instructors, shall certify as "solution changers" operators found by them to be competent and qualified. In addition to being qualified as "operators" these persons must receive approved instruction covering the changing of simulator external standard solutions for approved breath test instruments, taught by an instructor qualified by the state toxicologist. Details of persons so certified shall be maintained by the state toxicologist and available upon request.

If a solution changer fails or refuses to demonstrate to the state toxicologist or to a certified instructor, that he or she has the ability to adequately perform his or her responsibilities as a solution changer, then the state toxicologist will suspend their permit.

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NEW SECTION

WAC 448-16-110 Technicians. The state toxicologist shall certify as "technicians" such persons found to be competent and qualified to maintain the proper working order of breath test instruments through adjustment, repair, and regular service. Details of persons so certified shall be maintained by the state toxicologist and available upon request.

Technicians are authorized to perform maintenance, calibration and instruction in the use of the portable breath test devices. Technicians are also authorized to instruct persons otherwise qualified as "technicians," "instructors," "operators," and "solution changers" according to training outlines approved by the state toxicologist. Certified technicians are themselves authorized to perform the duties of "instructors," "operators," and "solution changers."

If a technician fails or refuses to demonstrate to the state toxicologist or his representative, that he or she has the ability to adequately perform his or her responsibilities as a technician, then the state toxicologist will suspend their permit.

[]

NEW SECTION

WAC 448-16-120 Permit cards. Pursuant to RCW 46.61.506, the state toxicologist shall authorize the issuance to persons deemed qualified as "instructors," "operators," "solution changers" or "technicians," a wallet-sized card bearing his or her name and designation. Permit cards shall bear the signature or facsimile signature of the state toxicologist. Such permit cards shall expire three years after the date on the card, unless renewed for a like three-year period. Operators whose authorization expires may take recertification training within ninety days following expiration of their prior certification, but are not certified to perform any evidential breath tests during that period. Once ninety days have elapsed after the expiration of authorization, the operator must repeat the basic certification training.

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NEW SECTION

WAC 448-16-130 Review, approval, and authorization by the state toxicologist of training courses and outlines. The state toxicologist shall approve and authorize such courses and course outlines (of his own promulgation or submitted for consideration by outside agencies or individuals) required in the training of breath test program personnel. Such review, approval, and authorization will be so signified by a signed statement attached to each course outline. These course outlines may be reviewed and updated as necessary to maintain the quality of the breath test program. Instructors are directed to use only approved outlines in conducting the training of operators. Information concerning currently approved course outlines can be obtained on application to the office of the state toxicologist.

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NEW SECTION

WAC 448-16-140 Information concerning technical aspects of the breath test program. Documents used by the state toxicologist and personnel involved in breath testing for the state of Washington, which are available on request include: The simulator solution preparation protocol, alcohol analysis protocol, certification document for simulator solution, affidavit from analyst of simulator solution, data base, quality assurance protocol, quality assurance procedure report, operator course outline, operator refresher course outline, and operator training record. A fee may be charged to cover the cost of providing these copies. Copies of most of these records are available at no charge on a Web site maintained by the Washington State Patrol at http://breathtest.wsp.wa.gov/welcome.htm.

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Reviser's note: The unnecessary underscoring in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

NEW SECTION

WAC 448-16-150 Address for correspondence. Information regarding instrument records, or the certification of operators, instructors, solution changers, and technicians should be obtained from the Washington State Patrol, Breath Test Section, 811 E. Roanoke, Seattle, WA 98102.

Persons seeking information regarding other aspects of the breath alcohol testing program shall direct their request initially to the State Toxicologist, Washington State Toxicology Laboratory, Forensic Laboratory Services Bureau, Washington State Patrol, 2203 Airport Way S., Seattle, WA 98134.

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NEW SECTION

WAC 448-16-160 Severability. If any part or provision of these rules or regulations or the application thereof is held invalid, such invalidity shall not affect other provisions or applications of these rules which can be given effect without the invalid provision or application, and to this end any section, paragraph or sentence, is declared to be severable.

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

MARK LUDVIGSEN,	
Defendant/Appellant,	**Ct. of Appeals No. 57935-5-I** Superior Ct. No. 05-1-08111-9 SEA
vs.	
CITY OF SEATTLE,	**CERTIFICATE OF SERVICE BY U.S. MAIL**
Plaintiff/Respondent.	

The undersigned certifies under penalty of perjury under the laws of Washington the following:

I am a citizen of the united States of America, over age eighteen years and competent to be a witness herein.

That on the 13th day of November, 2006, I forwarded by U.S. Mail, postage prepaid, a true and correct copy of the attached *The City's Reply Brief* directed to:

Elizabeth Anne Padula
Goddard Wetherall Wonder & Padula
155 108th Ave NE Ste 700
Bellevue, WA 98004-5912

Theodore Wayne Vosk
Attorney at Law
8105 NE 140th Pl.
Bothell, WA 98011-5334

DATED this 13th day of November, 2006 in Seattle, Washington.

MOSES F. GARCIA

Thomas A. Carr
Seattle City Attorney
500 Fifth Avenue, Suite 5350
PO Box 94667
Seattle, WA 98124-4667
(206) 684-7757